No. 83-726

In The

Supreme Court of the United States

October Term, 1983

FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA and FIRST AMERICAN TITLE INSURANCE COMPANY OF SOUTH DAKOTA,

Petitioners,

vs.

SOUTH DAKOTA LAND TITLE ASSOCIATION, SOUTH DAKOTA ABSTRACTERS' BOARD OF EXAMINERS, BLACK HILLS LAND AND ABSTRACT COMPANY, DENNIS O. MURRAY, SECURITY LAND AND ABSTRACT COMPANY, ESTATE OF GLEN M. RHODES, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, CHARLES NASS, and STATE OF SOUTH DAKOTA,

Respondents.

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners First American Title Company of South Dakota and First American Title Insurance Company of South Dakota respectfully submit the following Reply in support of their Petition for Writ of Certiorari:

I.

One major factual issue raised by Respondents Black Hills Land and Abstract Company and Dennis O. Murray

is whether the regulations of Respondent South Dakota Abstracters' Board of Examiners ("SDABE") require a South Dakota abstracter desiring to build an abstract plant in a county to go through a "prohibitively expensive and laborious process" of constructing an abstract plant from an actual check of each page of each book of recorded instruments in the county register of deeds office. *See* ARSD § 20:36:04:01. Those Respondents state in their Response at 4 that there was no record below for Petitioners' contention that this was the case, and indeed cite the Eighth Circuit's Opinion at 20 of Petitioners' Appendix, footnote 9:

> Apparently there was never any evidence offered at trial indicating exactly how costly it would be to assemble an abstract plant in accordance with ARSD § 20:36:04:01.

The trial court made no specific factual finding on this point.

Contrary to Respondents' position and the Eighth Circuit's assumption, there is ample evidence in the record that SDABE regulations make the construction of new plants in a county prohibitively expensive. First, ARSD § 20:36:04:01 itself requires a private abstract plant to contain an index which:

> must be made from an actual check of each page of each book of recorded instruments in said [register of deeds] office, and in no case will a copy or film of the numerical index in the register's office be accepted.

The unwillingness of the SDABE to permit the creation of a private index simply by copying the county's index, coupled with the fact reiterated by Respondents Black Hills Land and Abstract Company and Dennis O. Murray

at page 4 of their Response that "[b]ecause of the small population and attendant small number of real estate transactions, it is ordinarily financially prohibitive for more than one abstract company to operate in a county," obviously makes the construction of a plant prohibitively expensive. Walter J. Linderman, President of Petitioners, testified that the cost of the abstract plant of Petitioner First American Title Insurance Company of South Dakota in Pennington County in 1974 was between $68,000 and $75,000. Tr. at 230. This cost essentially was for the reconstruction of the register of deeds office in Pennington County as required by SDABE regulations. Tr. at 25. The work was done with microfilm cameras which "microfilmed all of the records in the register of deeds office and then those records were sent to a company that had a branch office in Denver called DynaComp, who, with the use of the microfilm prepared an index for all of the records." Tr. at 25. Meanwhile, Mr. Linderman made a general index with the use of the clerk of court's judgment books and the register of deeds' tax lien books, so he would have a register of all of the mechanics liens, federal tax liens, state liens and judgments that had been filed in the county. Tr. at 25. For Petitioners to duplicate that feat in the 66 counties of South Dakota would doubtlessly cost millions of dollars. (Simple numeric extrapolation indicates the cost would be between $4,480,000 and $4,950,000, not factoring in any inflation since 1974, the year the plant was constructed in Pennington County. Tr. at 26.) All this would have to be done just to avoid having to obtain countersignatures from other abstracters on title insurance policies on properties located outside Pennington County.

Were it not prohibitively expensive to construct an abstract plant in accordance with SDABE regulations in order to avoid the problems associated with the SDABE countersignature requirement, petitioners would have gladly done so and would not be complaining of the SDABE regulations or involved in this litigation. It is the SDABE regulations at issue which make countersignatures on title insurance policies necessary, where the South Dakota insurance agent and abstracter does not have an abstract plant in the county where the property is located.

II.

The State of South Dakota and the South Dakota Abstracters' Board of Examiners argue in their brief that Petitioners are simply requesting the Court to render an advisory opinion. The basis for this position is that the Eighth Circuit's opinion rests on an adequate and independent ground apart from the "state action doctrine". Essentially, the State Respondents argue that the Eighth Circuit recognizes that the Sherman Act, 15 U. S. C. § 1, does not preempt the *statutory* scheme set forth in South Dakota statutes governing abstracters and title insurance. The Eighth Circuit found that there was no irreconcilable conflict between the state statutes in question governing title insurance and abstracters in South Dakota and federal antitrust policy, citing *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

Respondents State of South Dakota and SDABE, however, confuse the two separate and distinct legal issues of Sherman Act pre-emption with the state action doctrine first enunciated in *Parker v. Brown*, 317 U. S. 341 (1943).

Compare Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U. S. 40 (1982) with *Rice v. Norman Williams Co.*, — U. S. —, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1983). Here, petitioners are not challenging any state statute; they have not asserted in their Petition that any statute of the State of South Dakoa has been preempted by the Sherman Act and the Supremacy Clause of the United States Constitution. Petitioners' Petition is limited to the anti-competitive regulations of the SDABE, a state agency. *See* ARSD §§ 20:36:04:01, 20:36:07:01 and 20:36:07:02. If these regulations are not insulated from antitrust scrutiny under the state action exemption, they are the proper subject of antitrust analysis. *See, e. g., United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979). Neither the Eighth Circuit nor the trial court analyzed the anti-competitive effect of those regulations in the absence of state action immunity.

The limited subject of the Petition goes to whether the general mandate of the South Dakota legislature that the SDABE governs abstracters can be interpreted as clothing the SDABE with immunity with respect to those regulations which Petitioners believe are anti-competitive in that they limit Petitioners' ability to provide title service on a state-wide basis. The issue of what actions of a state legislature creates state action immunity for an agency regulating an industry within the state is a matter of pressing public importance. This Court need not necessarily consider whether the regulations in question are in fact anti-competitive or contrary

to any federal antitrust statute absent immunity. It could determine only the applicability of state action immunity to the regulations. If no such immunity were found, this Court could leave to the trial court upon remand the determination of the legality *vel non* of the regulations.

III.

In conclusion, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit to determine the two questions presented as set forth on page i of the Petition.

Dated December 29, 1983.

Respectfully submitted,

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